

PART VIII: JUDICIAL PROCEEDINGS

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This section describes some of the judicial proceedings regarding child abuse or neglect. It is imperative that local department's seek legal counsel and advice when seeking court intervention in a CPS referral or ongoing case.

A. Emergency Removal Order (§ 16.1-251 Of The Code Of Virginia)

Va. Code §16.1-251(A). Emergency Removal Order.

A. A child may be taken into immediate custody and placed in shelter care pursuant to an emergency removal order in cases in which the child is alleged to have been abused or neglected.

The Virginia Administrative Code authorizes a CPS worker to petition the court to request an order to remove a child:

22 VAC 40-705-100(A). A child protective services worker may petition for removal pursuant to §§ 16.1-251 and 16.1-252 of the Code of Virginia.

The local department must work closely with the county or city attorney and the juvenile and domestic relations district court to develop protocols for these actions.

It is important and necessary for the local department to obtain legal counsel prior to petitioning for the removal of a child. The evidence supporting the decision to seek court intervention must be well documented in the case record. When a local department petitions a court for an emergency removal order, the local department may be referred to as the petitioner during the proceedings.

1.0 Ex Parte Emergency Removal Order

Va. Code. § 16.1-251(A). [An Emergency Removal Order]... may be issued ex parte by the court upon a petition supported by an affidavit or by sworn testimony in person before the judge or intake officer . . .

Ex parte is defined as "done or made at the insistence and for the benefit of one party only, without notice or argument by, any person adversely interested."¹ Essentially, an ex parte hearing allows the court to conduct a hearing without the presence of one of the parties because the situation demands immediate action or irreparable harm will likely occur. An emergency removal order may be issued ex parte by the court upon a petition supported by an affidavit or by sworn testimony in person before the judge or intake officer. If a court enters an emergency removal order, a preliminary removal hearing must occur no later than five (5) business days after the removal.

¹ Black's Law Dictionary 616 (8th ed. 2004).

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1.1 Petition for an Emergency Removal Order Must Allege Child is Abused or Neglected

In order to request an emergency removal order, the local department must file a petition requesting removal. The petition requesting removal of the child must allege that the child is abused or neglected.

2.0 Affidavit or Sworn Testimony Must Accompany Petition

The worker will be required to submit an affidavit or to present sworn testimony to prove that the case meets the criteria set forth for removing a child from the home. Competent evidence by a physician that a child is abused or neglected is considered adequate to support this type of petition.

3.0 Affidavit or Sworn Statement in Support of Emergency Removal Order

3.1 The Petition, Affidavit or Sworn Statement Must Specify the Factual Circumstances Warranting Removal

The petition or accompanying affidavit must contain a specific statement or account of the factual circumstances necessitating the removal of the child.

3.2 Evidence Must Establish an Immediate Threat to Life or Health of the Child

Va. Code § 16.1-251(A)(1). [The petition, affidavit or sworn testimony must establish that] The child would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to or left in the custody of his parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition.

The circumstances of the child are such that remaining with the parent, legal guardian or caretaker presents an imminent danger to the child's life or health.

3.3 Petition, Affidavit or Sworn Testimony Must Show Reasonable Efforts to Prevent Removal

Va. Code § 16.1-251(A)(2). [The petition, affidavit or sworn testimony must establish that] ... reasonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably protect the child's life or health pending a final hearing on the petition...

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Removal of a child should only occur after consideration of alternatives to out-of-home placement. The court must be presented with an affidavit or sworn testimony establishing that reasonable efforts have been made to prevent removal of the child from his home.

3.4 Petition, Affidavit or Sworn Testimony Must Show No Alternatives Less Drastic Than Removal

Va. Code [§ 16.1-251\(A\)\(2\)](#). [The petition, affidavit or sworn testimony must establish that]... there are no alternatives less drastic than removal of the child from his home which could reasonably protect the child's life or health pending a final hearing on the petition.

The safety of the child precludes provision of services to prevent placement because there are no alternatives less drastic than removal that could reasonably protect the child's life or health.

3.4.1 Alternatives Less Drastic Than Removal

Va. Code. [§ 16.1-251\(A\)\(2\)](#) [The petition, affidavit or sworn testimony must establish that]... the alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a preliminary protective order pursuant to [§16.1-253](#).

3.5 No Opportunity to Provide Preventive Services

Va. Code. [§ 16.1-251\(A\)\(2\)](#)... when a child is removed from his home and there is no reasonable opportunity to provide preventive services, reasonable efforts to prevent removal shall be deemed to have been made.

Circumstances may occur when there is no reasonable opportunity to provide preventive services before removing a child from the home.

3.6 Petition or Affidavit Must Include the Following Facts

The petition shall include the following facts:

- a. The name of the person who took emergency custody, the person's professional capacity and the telephone number where the person can be reached;

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- b. The child's name and birth date;
- c. The names of parents or guardians;
- d. The present or last known address of parents or guardians;
- e. A detailed description of the child's condition;
- f. Any information known concerning the circumstances of the suspected abuse or neglect, including the petitioner's name and the nature of the complaint;
- g. A brief explanation of the reasons why preventive services were not successful or could not be delivered;
- h. The specific time and date emergency custody was taken; and
- i. Documentation of the petitioning person's efforts to obtain a court order.

3.7 CPS Worker Must Consult with Supervisor & Foster Care Worker

Whenever a worker considers removal of a child, supervisory consultation and concurrence is required. When petitioning the court for removal of the child is seen as the only alternative, the worker must involve the foster care worker in staffing the case. The focus of the staffing shall be to assess whether or not there are any alternatives to removal. Evaluation shall be made of the resources available to meet the needs of the family and the specific child who is to be placed.

4.0 Five Day Hearing Must Occur Following Emergency Removal Order

Va. Code § 16.1-251(B). Whenever a child is taken into immediate custody pursuant to an emergency removal order, a hearing shall be held in accordance with §16.1-252 as soon as practicable, but in no event later than five business days after the removal of the child.

5.0 Suitable Relatives Must be Considered for Placement

Va. Code § 16.1-251(C). In the emergency removal order the court shall give consideration to temporary placement of the child with a suitable relative or other interested individual, including grandparents, under the supervision of the local department of social services, until such time as the hearing in accordance with [§16.1-252](#) is held.

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6.0 When Local Department has Legal Custody of Child

Va. Code § 16.1-251(D). The local department of social services having legal custody of a child as defined in [§16.1-228 \(i\)](#) shall not be required to comply with the requirements of this section in order to redetermine where and with whom the child shall live, notwithstanding that the child had been placed with a natural parent.

This section of the *Code of Virginia* means the presumption that it is in the best interest of the child to remain with his parents or guardians no longer exists, unless the child was placed in the custody of a natural parent. For example, if the local department has been given legal custody of a child as defined in [§16.1-228](#), then the local department will not be required to comply with the requirements of this section in order to redetermine where and with whom the child shall live.

[§ 16.1-228](#) of the *Code of Virginia* defines legal custody as meaning “(i) a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities or (ii) the legal status created by court order of joint custody as defined in [§ 20-107.2](#).”

B. Preliminary Removal Order (§ 16.1-252 of the Code of Virginia)

Va. Code § 16.1-252(A). A preliminary removal order in cases in which a child is alleged to have been abused or neglected may be issued by the court after a hearing wherein the court finds that reasonable efforts have been made to prevent removal of the child from his home. The hearing shall be in the nature of a preliminary hearing rather than a final determination of custody.

This order may be requested when the local department can prove that the circumstances of the child are such that the child is subject to severe or irremediable injury to his life or health and that no less drastic alternatives to removing custody are available. This order differs from the emergency removal order in that a hearing must take place before a preliminary removal order can be issued.

1.0 Social Worker Must Consult with Supervisor and Foster Care Worker

Whenever a worker considers removing a child, supervisory consultation and concurrence is required. When petitioning the court for removal of the child is seen as the only alternative, the CPS worker or social worker shall involve the foster care worker in staffing the case. The focus of the staffing shall be to assess whether or not there are any additional alternatives to removal. Evaluation shall be made of the resources available to meet the needs of the family and the specific child who is to be placed.

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2.0 Notice Must be Given to All Parties

Va. Code § 16.1-252(B). Prior to the removal hearing, notice of the hearing shall be given at least twenty-four hours in advance of the hearing to the guardian ad litem for the child, to the parents, guardian, legal custodian or other person standing in loco parentis of the child and to the child if he or she is twelve years of age or older. If notice to the parents, guardian, legal custodian or other person standing in loco parentis cannot be given despite diligent efforts to do so, the hearing shall be held nonetheless, and the parents, guardian, legal custodian or other person standing in loco parentis shall be afforded a later hearing on their motion regarding a continuation of the summary removal order. The notice provided herein shall include (i) the time, date and place for the hearing; (ii) a specific statement of the factual circumstances which allegedly necessitate removal of the child; and (iii) notice that child support will be considered if a determination is made that the child must be removed from the home.

Notice must be sent to the parents, guardian, legal custodian or other person standing in loco parentis. In loco parentis means, “of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all the responsibilities of a parent.”²

2.1 If Notice Cannot be Provided

Diligent efforts must be made to provide all parties with notice of the hearing. However, if notice to any of the parties cannot be given despite diligent efforts to do so, the hearing shall be held. The parents, guardian, legal custodian or other person standing in loco parentis shall be afforded a later hearing on their motion regarding a continuation of the summary removal order.

2.2 Notice Must Include Specific Information

The notice provided to the parties must state:

- a. The time, date and place for the hearing,
- b. A specific statement of the factual circumstances which allegedly necessitate removal of the child, and
- c. Notice that child support will be considered if a determination is made that the child must be removed from the home.

² Black’s Law Dictionary 803 (8th ed. 2004).

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3.0 Parties May Obtain Counsel

Va. Code § 16.1-252(C). All parties to the hearing shall be informed of their right to counsel pursuant to §16.1-266.

Prior to the preliminary removal hearing by the court of any case involving a parent, guardian or other adult charged with abuse or neglect of a child or a parent or guardian who could be subjected to the loss of residual parental rights and responsibilities, such parent, guardian or other adult shall be informed by a judge, clerk or probation officer of his right to counsel and be given an opportunity to:

- a. Retain counsel; or
- b. If the court determines that the parent, guardian or other adult is indigent or qualified, the court may appoint counsel; or
- c. Waive the right to representation by an attorney.

4.0 Preliminary Removal Hearing

The preliminary removal hearing will be conducted in the nature of a preliminary hearing rather than a final determination of custody.

5.0 For a Preliminary Removal Order to be Issued, Burden is on the Requesting Party

The burden to prove that the court should issue the preliminary removal order is placed upon the petitioning party. If the local department is the party asking the court to issue the order, then the burden is on the local department to prove the need to issue the order. The CPS worker must file a petition requesting a preliminary removal order, which includes a specific statement of the factual circumstances necessitating the removal of the child.

5.1 Burden of Proof-Preponderance of the Evidence

Each criterion for establishing the need to issue a preliminary removal order must be satisfied by a preponderance of the evidence.³

³ See: *Wright v. Arlington County Dept. of Social Services*, 9 Va. App. 411, 388 S.E.2d 477 (1990).

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5.2 Requesting Party Must Prove Imminent Threat to Life or Health of Child

Va. Code [§ 16.1-252\(E\)\(1\)](#). In order for a preliminary order to issue or for an existing order to be continued, the petitioning party or agency must prove:

1. The child would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to or left in the custody of his parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition;

5.3 Reasonable Efforts Must Have Been Made to Prevent Removal

Va. Code [§ 16.1-252\(E\)\(2\)](#). In order for a preliminary order to issue or for an existing order to be continued, the petitioning party or agency must prove:

2. Reasonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably and adequately protect the child's life or health pending a final hearing on the petition...

5.4 No Alternatives Less Drastic Than Removal

Va. Code [§ 16.1-252\(E\)\(2\)](#) ... the alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a preliminary protective order pursuant to [§16.1-253](#).

The alternatives less drastic than removal include providing medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a preliminary protective order pursuant to [§16.1-253](#).

5.5 No Reasonable Opportunity to Provide Services

Circumstances may occur when there is no reasonable opportunity to provide preventive services before removing a child from the home. When there is no opportunity to provide preventive services before removing a child, the court has the authority to deem that reasonable efforts to prevent removal were made by the local department.

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6.0 The Preliminary Removal Hearing

In the hearing, petitioner must prove:

- a. The child would be subjected to imminent threat to his life or health if the child remained with the caretaker;
- b. Such circumstances would result in severe and irremediable injury to the child; and
- c. The provision of services to prevent placement was not successful or services to prevent placement could not be given or delivered, and there are no alternatives less drastic than removal which could reasonably protect the child's life and health.

6.1 Parties May Present Witnesses and Evidence

Va. Code § 16.1-252(D). At the removal hearing the child and his parent, guardian, legal custodian or other person standing in loco parentis shall have the right to confront and cross-examine all adverse witnesses and evidence and to present evidence on their own behalf ...

6.2 Testimony of the Child May be Taken by Closed-Circuit Television

Va. Code § 16.1-252(D)... If the child was fourteen years of age or under on the date of the alleged offense and is sixteen or under at the time of the hearing, the child's attorney or guardian ad litem, or if the child has been committed to the custody of the Department of Social Services, the local department of social services, may apply for an order from the court that the child's testimony be taken in a room outside the courtroom and be televised by two-way closed-circuit television. The provisions of §63.2-1521 shall apply, mutatis mutandis, to the use of two-way closed-circuit television except that the person seeking the order shall apply for the order at least forty-eight hours before the hearing, unless the court for good cause shown allows the application to be made at a later time.

A child, fourteen or under at the time of the alleged incident, may testify under certain conditions as determined by the court in any civil proceeding involving allegations of abuse and neglect of that child. By motion of a party, the child's testimony may be taken by closed-circuit television, if the court finds that the child cannot testify in open court in the presence of the alleged abuser or neglecter for the following reasons:

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- a. The child's persistent refusal to testify despite judicial request to do so;
- b. The child's substantial inability to communicate about the offense; or
- c. The substantial likelihood, based on expert opinion testimony, that the child will suffer severe emotional trauma as a result of testifying.

7.0 If Court Orders Removal, Court Must Determine Who Shall Have Custody of the Child

Va. Code § 16.1-252(F1). Prior to the entry of an order pursuant to subsection F of this section transferring temporary custody of the child to a relative or other interested individual, including grandparents, the court shall consider whether the relative or other interested individual is one who (i) is willing and qualified to receive and care for the child; (ii) is willing to have a positive, continuous relationship with the child; and (iii) is willing and has the ability to protect the child from abuse and neglect. The court's order transferring temporary custody to a relative or other interested individual should provide for compliance with any preliminary protective order entered on behalf of the child in accordance with the provisions of [§16.1-253](#); initiation and completion of the investigation as directed by the court and court review of the child's placement required in accordance with the provisions of [§ 16.1-278.2](#); and, as appropriate, ongoing provision of social services to the child and the temporary custodian.

If the court determines that the child shall be removed pursuant to [§ 16.1-252\(E\)](#), then the court must determine with whom the child shall be placed. The court must place the child in the care and custody of a suitable person. The court must give consideration to placing the child in the care and custody of a nearest kin, including grandparents or personal friend. If such placement is not available, then the court may place the child in the care and custody of a suitable agency.

7.1 If Court Orders Removal, Court May Provide for Reasonable Visitation

Va. Code § 16.1-252(F)(2). [If the court determines that removal is proper, the court shall] Order that reasonable visitation be allowed between the child and his parents, guardian, legal custodian or other person standing in loco parentis, if such visitation would not endanger the child's life or health;

If the court finds that the child must be removed pursuant to [§ 16.1-252\(E\)](#), the court must determine whether reasonable visitation should be allowed between the child and his parents, guardian, legal custodian or

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other person standing in loco parentis. The court may allow reasonable visitation only if such visitation would not endanger the child's life or health.

7.2 If Court Orders Removal, Court Must Obtain Child Support

Va. Code [§ 16.1-252\(F\)\(3\)](#). [If the court determines that removal is proper, the court shall] Order that the parent or other legally obligated person pay child support pursuant to §16.1-290.

If the court finds that the child must be removed pursuant to §16.1-252(E), the court must order that the parent or person legally obligated for the child pay child support.

The court is required by § 16.1-290(C) to require that the parent or other person legally responsible for the child pay child support.

If a determination is made that the child must be removed from the home, then the local department must file a separate petition for child support as soon as practicable. To facilitate the requirement that the court order child support at the initial hearing, it is recommended that the worker request that the petition requesting removal of the child include a statement that if custody is transferred, the petitioner requests that the court address parental child support as defined in § 63.2-909.

Va. Code [§ 16.1-290](#). Support of committed juvenile; support from estate of juvenile.

C. Whenever a juvenile is placed in foster care by the court, the court shall order and decree that the parent or other legally obligated person shall pay the Department of Social Services pursuant to [§§20-108.1](#), [20-108.2](#), [63.2-909](#), and [63.2-1910](#).

Va. Code [§ 63.2-909](#). Child support for child placed in foster care by court.

Pursuant to [§16.1-290](#), responsible persons shall pay child support for a child placed in foster care from the date that custody was awarded to the local department of social services. The court order shall state the names of the responsible persons obligated to pay support, and either specify the amount of the support obligation pursuant to [§§20-108.1](#) and [20-108.2](#) or indicate that the Division of Child Support Enforcement will establish the amount of the support obligation. In fixing the amount of support, the court or the Division of Child Support Enforcement shall consider the extent to which the payment of support by the responsible person may affect the ability of such responsible person to implement a foster care plan developed pursuant to [§16.1-281](#).

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7.3 Court May Impose Additional Requirements or Conditions

Va. Code § 16.1-252(F)... In addition, the court may enter a preliminary protective order pursuant to § 16.1-253 imposing requirements and conditions as specified in that section which the court deems appropriate for protection of the welfare of the child.

8.0 Court Must Make Finding of Abuse or Neglect

Va. Code § 16.1-252(G) At the conclusion of the preliminary removal order hearing, the court shall determine whether the allegations of abuse or neglect have been proven by a preponderance of the evidence. Any finding of abuse or neglect shall be stated in the court order...

8.1 A Party May Object to the Court Making a Finding of Abuse or Neglect

Va. Code § 16.1-252(G)... However, if, before such a finding is made, a person responsible for the care and custody of the child, the child's guardian ad litem or the local department of social services objects to a finding being made at the hearing, the court shall schedule an adjudicatory hearing to be held within thirty days of the date of the initial preliminary removal hearing...

8.2 Adjudicatory Hearing

Va. Code § 16.1-252(G)... The adjudicatory hearing shall be held to determine whether the allegations of abuse and neglect have been proven by a preponderance of the evidence.

At the adjudicatory hearing, the court must make a finding of abuse or neglect. It is not necessary to determine the perpetrator of the abuse or neglect in order to make a finding of abuse or neglect.

8.3 Notification of Adjudicatory Hearing

Va. Code § 16.1-252(G)... Parties who are present at the preliminary removal order hearing shall be given notice of the date set for the adjudicatory hearing and parties who are not present shall be summoned as provided in [§16.1-263](#). The hearing shall be held and an order may be entered, although a party to the preliminary removal order hearing fails to appear and is not represented by counsel, provided personal or substituted service was made on the person, or the court determines that such person cannot be found, after reasonable effort, or in the case of a person who is without the Commonwealth, the person cannot be found or his post office address cannot be ascertained after reasonable effort...

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8.4 Any Preliminary Removal Order or Protection Orders Remain in Effect Pending Adjudicatory Hearing

Va. Code § 16.1-252(G)... The preliminary removal order and any preliminary protective order issued shall remain in full force and effect pending the adjudicatory hearing.

If a party raises an objection at the preliminary removal hearing to the court making a finding of abuse or neglect, the court may still issue a preliminary removal order or a preliminary protective order. The preliminary removal order and any preliminary protective order issued shall remain in full force and effect pending the adjudicatory hearing.

8.5 Dispositional Hearing

Va. Code § 16.1-252(H). If the preliminary removal order includes a finding of abuse or neglect and the child is removed from his home or a preliminary protective order is issued, a dispositional hearing shall be held pursuant to [§16.1-278.2](#)...

Regardless of whether the court makes a finding of abuse or neglect at the preliminary removal hearing, the court must schedule a dispositional hearing pursuant to [Va. Code § 16.1-278.2](#).

8.6 Scheduling the Dispositional Hearing

Va. Code § 16.1-252(H)... The dispositional hearing shall be scheduled at the time of the preliminary removal order hearing and shall be held within seventy-five days of the preliminary removal order hearing. If an adjudicatory hearing is requested pursuant to subsection G, the dispositional hearing shall nonetheless be scheduled at the initial preliminary removal order hearing. All parties present at the preliminary removal order hearing shall be given notice of the date scheduled for the dispositional hearing; parties who are not present shall be summoned to appear as provided in [§16.1-263](#).

9.0 Person Gaining Legal Custody of Child

Va. Code § 16.1-252(I). The local department of social services having legal custody of a child as defined in [§16.1-228 \(i\)](#) shall not be required to comply with the requirements of this section in order to redetermine where and with whom the child shall live, notwithstanding that the child had been placed with a natural parent.

This section means the presumption that it is in the best interests of the child to remain with his parents or guardians no longer exists, unless the child was placed in the custody of a natural parent. For example, if the local department has been given legal custody of a child as defined in [§ 16.1-228](#), then the local department will not be

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required to comply with the requirements of this section in order to redetermine where and with whom the child shall live.⁴ *This means that when the local department has legal custody of a child, it can move the child from the home of a natural parent and can change the child's placement without having to comply with the preliminary removal statute.*

10.0 Violation of Order Constitutes Contempt of Court

Va. Code § 16.1-252(J). Violation of any order issued pursuant to this section shall constitute contempt of court.

C. Preliminary Protective Order (§ 16.1-253 of the Code of Virginia)

22 VAC 40-705-100(B). A child protective services worker may petition for a preliminary protective order pursuant [§ 16.1-253](#) of the Code of Virginia.

1.0 Purpose of Preliminary Protective Order

Va. Code § 16.1-253(A). Upon the motion of any person or upon the court's own motion, the court may issue a preliminary protective order, after a hearing, if necessary to protect a child's life, health, safety or normal development pending the final determination of any matter before the court...

This order may be requested when it is not necessary to assume custody of the child, but court intervention is necessary. The court may intervene to assure that a child's parent or person responsible for the child's care observe reasonable conditions of behavior in order to preserve the child's life, health and safety, and to maintain the child in his or her own home.

2.0 The Court's Authority

Va. Code § 16.1-253(A)... The order may require a child's parents, guardian, legal custodian, other person standing in loco parentis or other family or household member of the child to observe reasonable conditions of behavior for a specified length of time...

⁴ Va. Code § 16.1-228 defines legal custody as meaning "(i) a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities or (ii) the legal status created by court order of joint custody as defined in § 20-107.2."

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2.1 The Court May Order Person to Abstain From Offensive Conduct

Va. Code § 16.1-253(A)(1). To abstain from offensive conduct against the child, a family or household member of the child or any person to whom custody of the child is awarded;

2.2 The Court May Order Services

Va. Code § 16.1-253(A)(2). To cooperate in the provision of reasonable services or programs designed to protect the child's life, health or normal development;

2.3 The Court May Order Home Visits

Va. Code § 16.1-253(A)(3). To allow persons named by the court to come into the child's home at reasonable times designated by the court to visit the child or inspect the fitness of the home and to determine the physical or emotional health of the child;

2.4 The Court May Order Visitation with the Child

Va. Code § 16.1-253(A)(4). To allow visitation with the child by persons entitled thereto, as determined by the court;

2.5 The Court May Order Person to Refrain from Certain Acts

Va. Code § 16.1-253(A)(5). To refrain from acts of commission or omission which tend to endanger the child's life, health or normal development; or ...

2.6 The Court May Order Person to Have No Contact with Child or Family

Va. Code § 16.1-253(A)(6). To refrain from such contact with the child or family or household members of the child, as the court may deem appropriate, including removal of such person from the residence of the child. However, prior to the issuance by the court of an order removing such person from the residence of the child, the petitioner must prove by a preponderance of the evidence that such person's probable future conduct would constitute a danger to the life or health of such child, and that there are no less drastic alternatives which could reasonably and adequately protect the child's life or health pending a final determination on the petition.

The court may limit contact between the alleged abusive person and the child and the family or household members of the child. The court can remove a person from the residence. In order to remove a person from

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the residence, the court must find that a preponderance of the evidence establishes that the person's probable conduct in the future constitutes a danger to the life or health of the child. The court must also find, by a preponderance of the evidence, that there are no less drastic alternatives which could reasonably and adequately protect the child's life or health pending a final determination on the petition.

3.0 Requesting a Preliminary Protective Order

Va. Code § 16.1-253(B). A preliminary protective order may be issued ex parte upon motion of any person or the court's own motion in any matter before the court, or upon petition. The motion or petition shall be supported by an affidavit or by sworn testimony in person before the judge or intake officer which establishes that the child would be subjected to an imminent threat to life or health to the extent that delay for the provision of an adversary hearing would be likely to result in serious or irreparable injury to the child's life or health. If an ex parte order is issued without an affidavit being presented, the court, in its order, shall state the basis upon which the order was entered, including a summary of the allegations made and the court's findings. Following the issuance of an ex parte order the court shall provide an adversary hearing to the affected parties within the shortest practicable time not to exceed five business days after the issuance of the order.

A preliminary protective order can be requested by making a motion during any matter before the court or by filing a petition. The court may issue the preliminary protective order ex parte.

3.1 Motion or Petition Must Establish Imminent Threat

Any motion or petition must be supported by an affidavit or by sworn testimony in person before the judge or intake officer. The testimony or petition must establish that the child would be subjected to an imminent threat to life or health to the extent that any delay would be likely to result in serious or irreparable injury to the child's life or health.

3.2 Ex Parte Preliminary Protective Order

A preliminary protective order may be issued ex parte by the court upon a petition supported by an affidavit or by sworn testimony in person before the judge or intake officer. Ex parte is defined as "Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested."⁵ Essentially, an ex parte

⁵ Black's Law Dictionary (7th ed. 1999).

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hearing allows the court to conduct a hearing without the presence of one of the parties because the situation demands immediate action or irreparable harm will likely occur. If an ex parte order is issued without an affidavit being presented, the court must state the basis upon which the order was entered in the order. The preliminary protective order must also include a summary of the allegations made and the court's findings.

3.3 Adversary Hearing Must Occur Within 5 Days of Issuance of Ex Parte Order

If a court enters a preliminary protective order ex parte, the court must provide an adversary hearing within the shortest practicable time not to exceed five (5) business days after the issuance of the order.

4.0 Notice of Hearing Must be Given

Va. Code [§ 16.1-253\(C\)](#). Prior to the hearing required by this section, notice of the hearing shall be given at least twenty-four hours in advance of the hearing to the guardian ad litem for the child, to the parents, guardian, legal custodian, or other person standing in loco parentis of the child, to any other family or household member of the child to whom the protective order may be directed and to the child if he or she is twelve years of age or older. The notice provided herein shall include (i) the time, date and place for the hearing and (ii) a specific statement of the factual circumstances which allegedly necessitate the issuance of a preliminary protective order.

5.0 Right to Counsel

Va. Code [§ 16.1-253\(D\)](#). All parties to the hearing shall be informed of their right to counsel pursuant to [§16.1-266](#).

Prior to the preliminary protective order hearing by the court of any case involving a parent, guardian or other adult charged with abuse or neglect of a child or a parent or guardian who could be subjected to the loss of residual parental rights and responsibilities, such parent, guardian or other adult shall be informed by a judge, clerk or probation officer of his right to counsel and be given an opportunity to:

- a. Retain counsel; or
- b. If the court determines that the parent, guardian or other adult is indigent or qualified, the court may appoint counsel; or
- c. Waive the right to representation by an attorney.

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6.0 Right to Present Witnesses and Cross-Examination

Va. Code § 16.1-253(E). At the hearing the child, his or her parents, guardian, legal custodian or other person standing in loco parentis and any other family or household member of the child to whom notice was given shall have the right to confront and cross-examine all adverse witnesses and evidence and to present evidence on their own behalf.

The local department may present evidence to establish the need for the protective order to be issued. That evidence may include witnesses, medical reports or any other evidence relevant to the subject matter. The parties to the proceeding maintain the right to cross-examine all adverse witnesses and evidence and to present evidence on their own behalf.

7.0 If the Preliminary Protective Order Petition Alleges Abuse or Neglect, Then the Court Must Make Finding of Abuse or Neglect

Va. Code § 16.1-253(F). If a petition alleging abuse or neglect of a child has been filed, at the hearing pursuant to this section the court shall determine whether the allegations of abuse or neglect have been proven by a preponderance of the evidence. Any finding of abuse or neglect shall be stated in the court order. However, if, before such a finding is made, a person responsible for the care and custody of the child, the child's guardian ad litem or the local department of social services objects to a finding being made at the hearing, the court shall schedule an adjudicatory hearing to be held within thirty days of the date of the initial preliminary protective order hearing. The adjudicatory hearing shall be held to determine whether the allegations of abuse and neglect have been proven by a preponderance of the evidence. Parties who are present at the hearing shall be given notice of the date set for the adjudicatory hearing and parties who are not present shall be summoned as provided in [§16.1-263](#). The adjudicatory hearing shall be held and an order may be entered, although a party to the hearing fails to appear and is not represented by counsel, provided personal or substituted service was made on the person, or the court determines that such person cannot be found, after reasonable effort, or in the case of a person who is without the Commonwealth, the person cannot be found or his post office address cannot be ascertained after reasonable effort. Any preliminary protective order issued shall remain in full force and effect pending the adjudicatory hearing.

If the petition requesting the issuance of a protective order alleges that the child was abused or neglected, then the court must make a determination whether the child was abused or neglected. The court must make that finding during the adversary hearing and based upon a preponderance of the evidence. Any finding of abuse must be stated in the court order.

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7.1 A Party May Object to the Court Making a Finding of Abuse or Neglect

At the preliminary protective order hearing, any party (a person responsible for the care and custody of the child, the child's guardian ad litem or the local department) may object to the court making a finding of abuse or neglect.

7.2 If a Party Objects to the Court Making a Finding of Abuse or Neglect

If one of the parties objects to the court making a finding of abuse or neglect, then the court must schedule an adjudicatory hearing to determine whether the allegations of abuse or neglect have merit. The adjudicatory hearing must be scheduled within thirty days of the date of the initial preliminary hearing.

7.3 Purpose of Adjudicatory Hearing

The adjudicatory hearing will be held to determine whether the allegations of abuse or neglect have been proven by a preponderance of the evidence.

7.4 Notice for Adjudicatory Hearing

The court must provide notice and schedule the adjudicatory hearing during the preliminary removal order hearing while all parties are present. Those parties who are not present for the preliminary removal hearing shall be summoned as provided in [§16.1-263](#). Pursuant to [§ 16.1-253\(F\)](#), if proper notice has been provided or attempted and a party fails to appear for the adjudicatory hearing, the court may conduct the hearing and make a finding of abuse or neglect without that party present.

7.5 Court Order Carries Full Force and Effect

If the court issued a preliminary protective order, the preliminary protective order remains in effect pending the adjudicatory hearing. An objection to the court making a finding of abuse or neglect does not stay the preliminary protective order.

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8.0 Dispositional Hearing

Va. Code § 16.1-253(G). If at the preliminary protective order hearing held pursuant to this section the court makes a finding of abuse or neglect and a preliminary protective order is issued, a dispositional hearing shall be held pursuant to §16.1-278.2. ...The dispositional hearing shall be scheduled at the time of the hearing pursuant to this section, and shall be held within seventy-five days of this hearing. If an adjudicatory hearing is requested pursuant to subsection F, the dispositional hearing shall nonetheless be scheduled at the hearing pursuant to this section. All parties present at the hearing shall be given notice of the date and time scheduled for the dispositional hearing; parties who are not present shall be summoned to appear as provided in [§16.1-263](#).

If there is no objection to the court making a finding of abuse or neglect, then the court should schedule a dispositional hearing to be conducted within seventy-five days of the date of the initial preliminary hearing.

8.1 Scheduling & Notice for Dispositional Hearing

Scheduling of the hearing and notice to all parties will be made during the initial preliminary hearing. If an objection to a finding of abuse or neglect is made by a party to the proceeding, then the court shall schedule an adjudicatory hearing to be held within thirty days of the initial preliminary hearing.

9.0 Preliminary Protective Order Cannot Remove Custody from Parents or Guardians

Va. Code § 16.1-253(H). Nothing in this section enables the court to remove a child from the custody of his or her parents, guardian, legal custodian or other person standing in loco parentis, except as provided in § 16.1-278.2, and no order hereunder shall be entered against a person over whom the court does not have jurisdiction.

A preliminary protective order cannot be used to remove custody of a child from the child's parents, guardian, legal custodian or other person standing in loco parentis.

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10.0 Violation of Preliminary Protective Order Constitutes Contempt of Court

Va. Code [§ 16.1-253\(J\)](#). Violation of any order issued pursuant to this section shall constitute contempt of court.

D. Petition for Child Support

22 VAC 40-705-100(C). Whenever the local department assumes custody of a child under subsection A or B of this section, a child protective services worker shall petition the court for parental child support.

At the initial hearing whenever custody of a child is removed (except in emergency removal order hearings) the court is required to order the parents to pay child support.

- a. To facilitate the requirement that the court order child support at the initial hearing, it is recommended that the worker include in the petition requesting custody of the child a statement that, if custody is transferred, the petitioner requests the court to address parental child support as defined in *Code of Virginia* [§ 63.2-909](#).
- b. The CPS worker is encouraged to discuss this aspect of the removal process with parents; the worker may wish to discuss the parents' financial status with them to help determine whether the court should be requested to exempt them from a support obligation.

E. Immunity from Civil or Criminal Liability

22 VAC 40-705-100(D). Any person who participates in a judicial proceeding resulting from making a child protective services report or complaint or from taking a child into custody pursuant to [§§ 63.2-1509, 63.2-1510, and 63.2-1517](#) of the Code of Virginia, shall be immune from any civil or criminal liability in connection therewith unless it is proven that such person acted in bad faith or with malicious intent pursuant to [§ 63.2-1512](#) of the Code of Virginia.